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IN THE

Supreme Court of the United States

October Term, 1968

No. 205.

MURCHISON AND COMPANY, a Delaware Corporation, and SUNRAY DX OIL COMPANY, a Delaware Corporation,
Petitioners,

v.

GLO CO., an Illinois Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION,

Petitioners

v.

GLO CO., AN ILLINOIS CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

A Writ of Certiorari is respectfully sought to review the order of the United States Court of Appeals for the Third Circuit reversing the order of the United States District Court for the District of Delaware.

OPINIONS BELOW.

Third Circuit. The opinion of the Court of Appeals dated December 20, 1967, reversing the dismissal by the District Court, has not been reported (Appendix A, *infra*, pp. A-1-A-3).

The majority and dissenting opinions of the Court of Appeals on rehearing dated March 20, 1968, reversing the dismissal by the District Court have not been reported (Appendix B, *infra*, pp. A-4-A-10).

District Court. The memorandum opinion of the District Court dismissing Respondent's cause is set forth in Appendix C, *infra*, pp. A-11-A-15; it was not reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit reversing the District Court's dismissal of the cause, was entered on December 20, 1967 (Appendix A, *infra*, p. A-3).

A timely petition for a rehearing was filed on January 3, 1968, and granted on February 1, 1968.

The judgment on rehearing, again reversing the District Court's discretionary order of dismissal, was entered on March 20, 1968 (Appendix B, *infra*, p. A-10).

QUESTIONS PRESENTED.

1. Whether a United States Court of Appeals may reverse a dismissal by a District Court for lack of prosecution where it is not found that the District Court abused its discretion.

2. Whether a United States Court of Appeals may reverse a dismissal by a District Court of an action which had been pending in the District Court for over eleven years without going substantially beyond the pleading stage and where plaintiff did nothing for more than one year after receiving a warning from the Court that dismissal might result from further inaction.

3. Whether a United States Court of Appeals may abrogate a standard local rule of the District Court governing prosecution of cases on its docket without finding either that the rule is *per se* invalid or that its particular application was an abuse of discretion.

STATUTES AND RULES INVOLVED.

Rule 1 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . They [Fed. R. Civ. P.] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 41(b) of the Federal Rules of Civil Procedure, dealing with involuntary dismissals, provides in pertinent part as follows:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits."

Civil Rule 12 of the United States District Court for the District of Delaware, dealing with dismissal of actions for failure to prosecute, provides as follows:

> "Subject to the provisions of Rule 23(c), F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

STATEMENT OF THE CASE.

This action was begun on November 1, 1954, nearly twelve years before its dismissal by the District Court. Glo Co. sued Murchison and Company (hereinafter "Murchison") and Sunray DX Oil Company (hereinafter "Sunray") in the United States District Court for the District of Delaware for royalties allegedly due under written instruments dated September 29, 1941, and August 31, 1950, involving assignments of certain oil and gas rights in Texas. Jurisdiction was based on diversity of citizenship under 28 U. S. C. § 1332. Defendants joined issue on December 23, 1954 by filing answers denying the material allegations of the complaint.

In the following nine and one-half years nothing more of substance was accomplished. After the filing of the original complaint in 1954, there were periods of total inactivity of nine months, thirty-two months, twenty-one months, two years, and the final period of sixteen months preceding the rule to show cause: The case went nowhere. The "activity" which punctuated these periods of inactivity was token only and was inspired by calendar calls. Finally in September, 1964, the District Court, while declining to dismiss the action for failure to prosecute, gave plaintiff a stern warning of the consequences of its continued inaction. Despite that warning, which generated nothing but a further amended complaint, which defendants answered in January, 1965, no steps were taken to move the case to trial. On June 3, 1966, nearly a year and one-half after the amended answers had been filed, the District Court issued, *sua sponte*, a rule to show cause why the action should not be dismissed.

After a hearing, the Court on August 10, 1966, filed a memorandum opinion (Appendix C, pp. A-11-A-15) dismissing the case with prejudice. The opinion details the protracted history of the proceedings.

Plaintiff appealed, and the United States Court of Appeals for the Third Circuit reversed. Although noting that

"a dismissal of this case certainly appears justified by the inaction of counsel in failing to move for trial after repeated warnings by the court," the Court of Appeals reversed this discretionary act (Appendix A, pp. A-1-A-3). Defendants filed for and received a rehearing. The rehearing had been sought on the grounds of an erroneous factual premise,[1] the conflict with opinions of the United States Supreme Court, other Circuits (including a conflict within the Third Circuit) and the adverse effect upon the administration of justice. The opinion of the Court on rehearing again reversed and remanded without finding any abuse of discretion or without citing any reasons but referring only to "the unusual nature of the circumstances." (Appendix B, pp. A-4-A-5). There was a vigorous dissent by Circuit Judge Van Dusen clearly pointing out plaintiff's dilatory conduct in the case justifying the District Court's dismissal and concluding that there was "no abuse of discretion in the order of the district court dismissing this action." (Appendix B, pp. A-5-A-10).

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1. The erroneous factual premise in the first opinion of the Court of Appeals was stated as follows:

> "'As the Court recognized, there appears to be no dispute that an amount of money is owed to plaintiff under the contracts in suit.' The basis for this premise seems to be an oral observation made by Chief Judge Wright of the District Court during the course of the argument on the final rule to show cause. This observation was a remark made before the dismissal as to possible methods of preserving one minute claim of plaintiff's many alleged claims in view of the fact that Sunray, one of the defendants, had admitted in its answer owing plaintiff the sum of $3,624.45 and in the answer actually tendered that sum. Judge Wright followed through on his remark concerning the protection of this admitted small part of the claim, and before the order was entered dismissing the case the amount was paid in full and accepted by plaintiff. Therefore, as of the time of the dismissal nothing was owed by any defendant. Thus, the only factual premise upon which the Court predicated the reversal is erroneous."

This factual error is fully documented in the petition for reargument filed in the Court of Appeals, pages 4-6, footnotes 5 through 8.

REASONS FOR ALLOWING THE WRIT.

This decision of the Third Circuit is squarely in conflict with this Court's decision in *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962). It is in conflict with other Circuit Courts in the United States and is in conflict with other recent decisions within the Third Circuit itself.

If this decision is permitted to stand, it will have far-reaching adverse effects on the administration of justice in the District Courts of the United States.

1. The Decision Below Is in Conflict With Other Opinions of the Third Circuit, of the Other Circuits, and of This Court.

The Court below did not consider whether there was an abuse of discretion by the District Court. The Court of Appeals violated firmly established principles of judicial review in merely substituting its own judgment for that of the District Court. Judge Van Dusen's dissent points this out succinctly; "[a] careful review of this record discloses no abuse of discretion in the order of the district court dismissing this action." (Appendix B, p. A-10).

This was done even though the original opinion by the Court below stated:

> "The Court has a wide discretion as to penalties for failure of diligent prosecution. Lyford v. Carter, 274 F. 2d 815 (3rd Cir. 1960) [sic]. *A dismissal of this case certainly appears justified by the inaction of counsel in failing to move for trial after repeated warnings by the Court.*" (Appendix A, p. A-2), (Emphasis added)

Previous decisions of the United States Court of Appeals for the Third Circuit uphold the discretionary power of the District Courts to dismiss for lack of prosecution. *Kenney v. California Tanker Company,* 381 F. 2d 775 (3d Cir. 1967), cert. den. — U. S. —, 19 L. Ed. 2d 870 (1968) (specifically upholding the power of the District Court under the precise local rule involved here); *Torino v. Texaco, Inc.,* 378 F. 2d 268 (3d Cir. 1967). In *Kenney* the Court stated that "[a] myriad of cases could be cited for the proposition that we will not reverse the district court's dismissal absent a clear abuse of discretion, . . .", 381 F. 2d at 778. Such a holding is consistent with decisions of other courts of appeal. See, for example, *Esteva v. House of Seagram, Inc.,* 314 F. 2d 827 (7th Cir. 1963); *Grunewald v. Missouri Pacific Railroad Company,* 331 F. 2d 983 (8th Cir. 1964); *Fitzsimmons v. Gilpin,* 368 F. 2d 561 (9th Cir. 1966); *Davis v. Operation Amigo, Inc.,* 378 F. 2d 101 (10th Cir. 1967); *Schwarz v. United States,* 384 F. 2d 833 (2d Cir. 1967); *Durham v. Florida East Coast Railway Company,* 385 F. 2d 366 (5th Cir. 1967).

As this court has specifically stated:

> "Whether such an order [of dismissal] can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." *Link v. Wabash Railroad Co., supra,* at 633.

The opinion below deprives the District Courts of any meaningful standards for exercise of their discretion when it states:

> "We have the utmost sympathy with the desire of the district court to enforce its Local Rule 12. However, after consideration of the complex factual circumstances of the case, we conclude with the greatest reluctance that in view of the unusual nature of the

> circumstances of this case the interest of justice will best be served by affording plaintiff an opportunity to prove its case at trial." (Appendix B, p. A-5)

Nowhere does the opinion identify or articulate the "unusual nature of the circumstances" to which it refers; nor does it set forth any standards to govern the District Courts.

Under this directive, a District Court could never dismiss a case for failure to prosecute if there were any "unusual circumstances", no matter how long the delay. The purpose of the grant of the discretionary power to trial courts is to enable them to administer justice and to regulate their dockets, under all circumstances—"unusual" or not. Indeed this is the policy of Rule 1, Fed. R. Civ. P.—to "secure the just, speedy and inexpensive determination of every action".

The decision below would seem to require an *ad hoc, de novo* hearing at the appellate level on the order of dismissal. However, under *Link v. Wabash Railroad Co., supra, Kenney v. California Tanker Company, supra,* and the other cases cited, *supra,* p. 7, a party is only entitled to a determination of whether the dismissal was within the range of discretion of the District Court. Thus, the decision below is in direct conflict with *Link, Kenney* and the decisions of the other circuits in that the Court of Appeals substituted its discretion for that of the District Court, contrary to the above standards.

2. Adverse Effect on Judicial Administration.

This is a petition to review a reversal of an order of dismissal by a District Court under Dist. Del. Civ. R. 12 and Fed. R. Civ. P. 41(b). This Court has held that a District Court judge has the authority and discretion to

dismiss, *sua sponte,* for failure to prosecute. *Link v. Wabash Railroad Co., supra.* The reason for vesting the District Courts with this discretion is to ". . . . prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts [, and] . . . to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. . . . [This] 'inherent power' [is] governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash Railroad Co., supra,* at 629-31.

With respect to delay and the administration of practice, the Chief Justice stated recently:

> "The orderly and expeditious processing of litigation is a right which each of us should be able to ask of our judicial system, no matter what our station in life or how meager or non-existent our resources may be. . . . .
>
> • • •
>
> "These are examples of instances where both bench and bar have failed in their duty to advance the cause of their clients and to fulfill the needs of society for the expeditious administration of justice. Such inaction not only clogs court dockets; it is grossly unfair to clients.
>
> • • •
>
> ". . . In some kinds of litigation, gaining delay after delay becomes a way of life. Delay becomes a tool by which many lawyers carry on their business and the more skillful they are in this regard, the more able they are reputed to be. While the profession does not generally condemn the practice, it does perpetrate in-

justice, and is an imposition on the court." Speech by Chief Justice Earl Warren, Sesquicentennial Banquet of the Law School of Harvard University, September 23, 1967, in 51 Judicature 196 (1968).

The District Courts' inherent power has been destroyed by the opinion below. No longer will courts be able to control their calendars or prevent dilatory tactics in the interest of the "expeditious administration of justice." District Courts will be without standards to dismiss a case. Knowing that the discretion of the Court of Appeals will be substituted for their discretion, the District Courts will lose control of their calendars. Procrastination and harassment by delay are honored above justice and efficiency when a court is stripped of its discretion to dismiss cases involving extraordinary inaction and delay. Local R. 12 and Fed. R. Civ. P. 41(b), specifically approved by this Court in *Link v. Wabash Railroad Co., supra,* are divested of all meaning and purpose by the decision below.

Indeed, a District Court Judge will look at this opinion with the established facts set forth in Judge Van Dusen's dissenting opinion and wonder if there could be a much more compelling case for dismissal. The reversal ordered by the majority opinion, however, will almost certainly leave such a judge at sea. If his case presents a fact situation less compelling for dismissal (and we respectfully venture to say that not many cases will be more compelling for dismissal than the instant case), he can hardly feel secure in dismissing. The inevitable result would seem to be a distinct tendency to keep stale cases on the dockets with a substantially diminished effective power to move them along. Even if some district judges will have the courage to dismiss, appeals will proliferate and Courts of Appeals will have similar difficulty in determining their scope of review.

CONCLUSION.

For the reasons stated above, the decision is in conflict with the decisions of this Court and the other circuits. The decision of the Court of Appeals also raises a question of vital importance in the administration of justice by District Courts. Therefore, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Dated: June 18, 1968.

APPENDIX A.

Opinion and Judgment of the Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16236

GLO CO., AN ILLINOIS CORPORATION,
Appellant,

v.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued April 18, 1967

Before SMITH and FREEDMAN, *Circuit Judges* and WORTENDYKE, *District Judge*

OPINION OF THE COURT

(Filed December 20, 1967)

PER CURIAM.

This is an appeal from orders of the United States District Court for the District of Delaware dismissing an action to enforce plaintiff's rights under contracts made with defendants. The order of dismissal for failure to prosecute was based upon the court's own motion under

Civil Rule 12 of the United States District Court for the District of Delaware.[1]

The present action was commenced on November 1, 1954. On September 18, 1963, the District Court issued an order to show cause why the case should not be dismissed for lack of prosecution. At oral argument, on its return, the Court warned plaintiff's counsel that no further delay would be tolerated. The Court then dismissed the rule to show cause. Upon return of a subsequent order to show cause, issued on June 3, 1966, plaintiff's counsel assured the Court that the matter would be moved for trial. Nevertheless, the Court dismissed plaintiff's case with prejudice and refused to reopen on motion for reargument. Plaintiff says that the dismissal was an abuse of judicial discretion.

The Court has a wide discretion as to penalties for failure of diligent prosecution. Lyford v. Carter, 274 F. 2d 815 (3rd Cir. 1960). A dismissal of this case certainly appears justified by the inaction of counsel in failing to move for trial after repeated warnings by the court. However, a dismissal with prejudice is an extremely harsh penalty for such delay.

As the Court recognized, there appears to be no dispute that an amount of money is owed to plaintiff under the contracts in suit. A dismissal with prejudice has the effect of stripping plaintiff of the power to enforce these contract rights. Even the Court below intimated that this was not the result it wanted to bring about, stating: "My point is

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1. Rule 12 provides:

Subject to the provisions of Rule 23(c), F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion . . . enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such action for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule.

merely that with respect to that [the amount of money owed] I certainly don't want to dismiss a suit where somebody says 'I owe somebody some money'; but on the other hand I am considering very seriously dismissing this suit, and I don't want to do anything that is detrimental to a party who has a perfectly legitimate right, which the other side does not deny. . . . The only thing I would like to do in the event I do dismiss this is to keep that matter open, so that if it does require litigation, or the parties can't settle as to the amount that is due . . . then it can be determined by the Court in the usual and proper manner." We agree that this should be the result. To that end the cause should be reinstated and brought to trial with all convenient speed.

The judgment of the District Court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Judge Smith did not participate in the decision of this case because of illness.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed August 11, 1966 and August 24, 1966, be, and the same are hereby reversed, with costs, and the cause remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:
THOMAS F. QUINN,
Clerk.

December 20, 1967

APPENDIX B.

Opinion and Judgment of the Court of Appeals for the Third Circuit on Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16236

GLO CO., AN ILLINOIS CORPORATION,
Appellant,

v.

MURCHISON AND COMPANY, A DELAWARE CORPORATION,
AND SUNRAY DX OIL COMPANY,
A DELAWARE CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued April 18, 1967

Before SMITH and FREEDMAN, *Circuit Judges* and WORTENDYKE, *District Judge*

Reargued February 20, 1968

Before KALODNER, FREEDMAN and VAN DUSEN, *Circuit Judges*

OPINION ON REHEARING.

(Filed March 20, 1968)

PER CURIAM:

This is an old suit which the district court, acting on its own motion, dismissed with prejudice under its Local Rule 12 which authorizes such disposition where no action has been taken for a period of one year.[1]

We have the utmost sympathy with the desire of the district court to enforce its Local Rule 12. However, after consideration of the complex factual circumstances of the case, we conclude with the greatest reluctance that in view of the unusual nature of the circumstances of this case the interest of justice will best be served by affording plaintiff an opportunity to prove its case at trial.

We therefore set aside the dismissal of the action by the district court, which should fix a specific time for the trial of the case at which plaintiff will have the opportunity to go forward on pain of dismissal with prejudice for lack of prosecution.

VAN DUSEN, *Circuit Judge,* dissenting

In view of the record in this case, I dissent respectfully from the majority opinion. This suit was started on November 1, 1954. In spite of the district court rule quoted

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1. Local Rule 12 provides:

"Subject to the provisions of Rule 23(c), F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

in the majority opinion providing for dismissal in cases "wherein no action has been taken for a period of one year", at least five periods of no action by plaintiff for over a year[1] as well as numerous warnings of dismissal to counsel for plaintiff occurred before the case was finally dismissed in August, 1966 and the Motion for Reargument and To Alter and Amend the Judgment of Dismissal was denied. These warnings were as follows:

1. On September 2, 1959, the Clerk wrote plaintiff that the case would be dismissed for lack of prosecution unless some action were taken by October 6 (92a) and on September 29, plaintiff filed a motion for partial summary judgment, which was withdrawn five years later.

2. On September 18, 1963, the court on its own motion ordered that the action would be dismissed "unless good reason for the inaction is shown at a hearing fixed for . . ." September 27, 1963.

3. On September 24, 1964, the Chief Judge held a conference at which he gave plaintiff's counsel this warning (11b):

> ". . . I will tell you this: that if this case is not dismissed, Mr. Wilson, you had better watch yourself and comply with these rules and go ahead with this. Because I am not going to tolerate any further delay in this matter. If you are not ready for trial, if you don't want to try this case, say you don't want to try it and dismiss it. But something has got to be done about it. We are not going to let these cases hang along, here, for no good reason except the lack of diligence on the part of counsel."

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1. January 1, 1957 to September 29, 1959, December 1959 to September 1961, September 19, 1961 to October 10, 1961 & October 12, 1961 to September 19, 1963, September 21, 1963 to September 20, 1964, and January 1965 to June 3, 1966. See Docket Entries at Ia-IVa.

4. In April, 1966, plaintiff answered a letter from the law clerk of the Chief Judge asking the status of the case by saying that he was preparing some interrogatories (18b-19b and 95a) but he filed nothing until after the Chief Judge entered the following order on June 3, 1966 (77a):

> "AND NOW, to-wit, this third day of June, 1966, it appearing that no action has been taken in the above case for a period of one year from this date, it is
>
> "ORDERED by the Court on its own motion that the action will be dismissed pursuant to Rule 12 of this Court unless good reason for the inaction is shown at a hearing hereby fixed for 10:00 a.m., June 27, 1966."

After the hearing on June 27, the Chief Judge found there was no good reason for the above-described inaction in a Memorandum Opinion filed August, 1966 (92a-96a) where this language appears at 95a-96a:

> "At the hearing on the present show cause order, plaintiff again assured the Court that the action would be moved for trial. However, after the repeated warnings by the Court and the past assurances by plaintiff that this action would be tried shortly, the Court no longer feels justified in allowing this action to remain on its docket to serve as a sword over defendants' heads. The Court will not subject defendants to any more show cause hearings."

The Supreme Court of the United States has held that a district court judge has the discretion to dismiss an action under such circumstances irrespective of the existence of a Rule such as Local Rule 12. See *Link v. Wabash Railroad Co.*, 370 U. S. 626, 633-43 (1962) [2] where the court said:

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2. In the *Link* case, *supra*, the court used this language at pp. 629-631:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute can-

"Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion . . .

"There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' *Smith v. Ayer*, 101 U. S. 320, 326."

This court has recently followed the holding in the *Link* case, *supra*, in at least two cases:

In *Torino v. Texaco, Inc.*, 378 F. 2d 268, 270 (3d Cir. 1967), this court said:

"In *Link*, the Supreme Court stated that the 'inherent power' of a court to *sua sponte* dismiss a case for want of prosecution had not been disturbed by Fed-

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not seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. . . .

"The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

eral Civil Procedure Rule 41(b), and held that the dismissal did not constitute an abuse of discretion especially when *all* the circumstances of the case were considered. Here, as in *Link*, there were numerous instances of delays; and the district court stated that it relied upon all of them in dismissing. Considering the totality of circumstances as they existed before the district court, we cannot conclude that the district court abused its discretion."

In *Kenney v. California Tanker Company*, 381 F. 2d 775, 778 (3d Cir. 1967), cert. denied, — U. S. —, 36 L. Week 3295 (Jan. 22, 1968), this language was used:

> "Here the libellant was warned over two years before the final order of dismissal that the case would be dismissed if he did not make efforts to prosecute the case, but the record clearly indicates that libellant made only token efforts toward this end. A myriad of cases could be cited for the proposition that we will not reverse the district court's dismissal absent a clear abuse of discretion, . . ."

Such holdings are consistent with those by other courts of appeals. See, for example, *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406, 409 (9th Cir. 1940); *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825, 826 (10th Cir. 1948); *Fitzsimmons v. Gilpin*, 368 F. 2d 561, 562 (9th Cir. 1966); and cases cited in those cases.

The death and incapacity of two principal witnesses for defendants during this period of over 11 years between November, 1954 and June, 1966 (T. F. Murchison died in November, 1955, see 16b-17b & 35b and P. H. Swearingen, Esq., has been incapacitated at least since June, 1966, see 89a, 35b & 36b) certainly could be found to be prejudicial to defendants even though such prejudice is not required to

justify a dismissal for lack of due diligence by plaintiff. See *Messenger v. United States*, 231 F. 2d 328, 331 (2nd Cir. 1956).

A careful review of this record discloses no abuse of discretion in the order of the district court dismissing this action.[3] As stated in the *Fitzsimmons* case, *supra*, at 562:

> "On this record appellant left the court no alternative but to grant the motion or countenance a flat and unexplained disregard of the court's rules."

On this record, I would affirm the action of the district court.

JUDGMENT ON REHEARING.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed August 11, 1966 and August 24, 1966, be, and the same are hereby reversed, with costs, and the cause remanded with the direction that the District Court fix a specific time for the trial of the case at which plaintiff will have the opportunity to go forward on pain of dismissal with prejudice for lack of prosecution.

ATTEST:
THOMAS F. QUINN,
Clerk.

March 20, 1968

---

3. For example, no motion to set the case for trial was ever filed between 1954 and June, 1966 as required by the district court's Local Rule 13(B). The last of several promises by plaintiff that it could be ready for trial was at the calendar call of September 21, 1965 when counsel assured the court "this case can be tried this spring" (see page 13 of appellant's brief) but, as noted above, no motion had been filed by June 3.

APPENDIX C.

Memorandum Opinion and Order of the United States District Court for the District of Delaware.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION No. 1659

GLO CO., AN ILLINOIS CORPORATION,
Plaintiff,

v.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, BARNSDALL OIL COMPANY, A DELAWARE CORPORATION, AND SUNRAY OIL CORPORATION, A DELAWARE CORPORATION,
Defendants.

WILLIAM T. LYNAM, III, ESQUIRE, of WILSON AND LYNAM, Wilmington, Delaware, for plaintiff;

WILLIAM S. MEGONIGAL, JR., ESQUIRE, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware, for defendant, MURCHISON AND COMPANY;

ROBERT H. RICHARDS, JR., ESQUIRE, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware, for defendant, SUNRAY OIL CORPORATION.

MEMORANDUM OPINION.

WRIGHT, *Chief Judge.*

This Court, on its own motion in accordance with the Civil Rules of the United States District Court for the District of Delaware, Rule 12, issued a rule to show cause on June 3, 1966, why this case should not be dismissed for lack of prosecution. A short recital of the history of this case will show why the case should be dismissed.

The complaint was filed on November 1, 1954 and charged the various defendants with violating a contract concerning certain oil leases. Answers were filed by defendant, Murchison and Company, and defendant, Sunray, on December 23, 1954 and on January 13, 1955, Murchison and Company filed an answer to the cross claim of Sunray Oil Corporation. Discovery was begun and eventually an argument concerning Sunray's objections to plaintiff's interrogatories was scheduled for January 7, 1957. Plaintiff, by letter of January 3, 1957, withdrew its interrogatories and the argument was cancelled.

With the exception of the withdrawal by one of defendants' counsel, the case then laid dormant until September 2, 1959 when the clerk for the United States District Court for the District of Delaware wrote counsel informing them the case would be dismissed for lack of prosecution unless some action were taken by October 6, 1959.

On September 29, 1959, seven days before the date on which dismissal was to occur, plaintiff filed a motion for partial summary judgment. Nothing further was done concerning this motion until plaintiff withdrew it on October 5, 1964.

On September 18, 1961, plaintiff again filed various motions including a request for permission to amend the com-

plaint. The motions were then set for hearing on October 18, 1961; however, all counsel in the case wrote to the Court requesting the hearing be cancelled since the motions were not ripe for argument.

For the next two years nothing further was done in the case. On September 18, 1963, this Court issued an order to show cause, returnable on September 27, 1963, why the case should not be dismissed for lack of prosecution.

On September 19, 1963, counsel for plaintiff wrote the Court:

> "It is my expectation that shortly after the filing of answers to the amended Complaint, this matter may be set down for trial. It may be that defendants will wish to press their motions for summary judgment, but it is my belief that the amended Complaint avoids the necessity for disposing of that motion."

At the subsequent oral argument the Court warned plaintiff's counsel that no further delay would be tolerated. The Court said:

> "But I will tell you this: that if this case is not dismissed, * * * you had better watch yourself and comply with these rules and go ahead with this. Because I am not going to tolerate any further delay in this matter. If you are not ready for trial, if you don't want to try this case, say you don't want to try it and dismiss it. But something has got to be done about it. We are not going to let these cases hang along, here, for no good reason except the lack of diligence on the part of counsel."

Subsequently, the Court dismissed the rule to show cause.

After the call of the calendar in September 1964, plaintiff in an explanatory letter of September 17, 1964 to the

Court again represented that the case would be tried without delay. Plaintiff stated:

> "Unless the Court takes action precluding such a course, plaintiff plans, within the next two weeks, to do the following:
>
> a) Bring on a motion for leave to amend the complaint in the form already agreed to by both defendants.
>
> b) If the motion is granted, await defendants' answers to the amended complaint.
>
> c) List the matter for trial as soon as defendants' answers are received.
>
> Since the entire action turns on the construction of certain documents, it seems unlikely that protracted discovery will be necessary. Assuming that there are no further delays, it is not unreasonable to hope that the action may be terminated by March of 1965."

On October 16, 1964, the amended complaint was allowed upon stipulation of the parties. On January 15, 1965 and January 18, 1965, answers were filed by the two defendants. Although the case was now ready for trial from the plaintiff's point of view (see quotes from plaintiff's letters of September 19, 1963 and September 17, 1964, supra), no motion was filed by plaintiff to set a trial date.

The case again lay dormant and upon the call of the calendar on September 21, 1965 plaintiff again assured the Court the case would be tried soon. Plaintiff stated:

> "Our counsel from Chicago tells us quite clearly that if some answers to interrogatories may be had this case can be tried this spring, and he assured me of that."

No interrogatories were filed prior to the spring of 1966.

On April 18, 1966, upon the direction of the Court, a letter was sent to counsel asking them the status of the case. Plaintiff responded and stated:

> "I am in the process of preparing some additional interrogatories. Moreover, there is outstanding some objections by Sunray to written interrogatories. This defendant did file a brief in support of its objections on January 4, 1957. I shall undertake to answer this brief some time within the next thirty days."

The interrogatories referred to in the above quote had been withdrawn by plaintiff by letter to the Court on January 3, 1957.

Finally, the present order to show cause was issued on June 3, 1966 since the plaintiff had done nothing further. On June 7, 1966, plaintiff filed various additional interrogatories, most of which had previously been answered or else had been asked in 1956 and had been withdrawn by plaintiff on January 3, 1957.

At the hearing on the present show cause order, plaintiff again assured the Court that the action would be moved for trial. However, after the repeated warnings by the Court and the past assurances by plaintiff that this action would be tried shortly, the Court no longer feels justified in allowing this action to remain on its docket to serve as a sword over defendants' heads. The Court will not subject defendants to any more show cause hearings.

The rule is made absolute.

Submit order.

Wilmington, Delaware
August 10, 1966

ORDER.

And Now, to Wit, this 11th day of August, 1966, the Court, of its own motion, having on June 3, 1966 issued a rule to show cause why the above action should not be dismissed, returnable on June 27, 1966, and said rule to show cause having come on before the Court on June 27, 1966, and having been fully argued, upon the Opinion of the Court dated August 10, 1966,

It Is Ordered that said rule to show cause is made absolute and the above entitled cause is hereby dismissed with costs to be taxed against the plaintiff.

Caleb M. Wright, *C. D. J.*

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 205.

MURCHISON AND COMPANY, a Delaware Corporation, and SUNRAY DX OIL COMPANY, a Delaware Corporation,
Petitioners,

v.

GLO CO., an Illinois Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE REQUEST FOR A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX D.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 205

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION,

Petitioners,

v.

GLO CO., AN ILLINOIS CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE REQUEST FOR A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This is Respondent's brief in opposition to the request for a Writ of Certiorari to review the Order of the United States Court of Appeals for the Third Circuit. See (A-3).

JURISDICTION.

While the petitioners do not note the statutory provision believed to confer on the Court jurisdiction to review the judgment in question by writ of certiorari it is 28 U. S. C. A. § 1254.

QUESTION PRESENTED.

1. Are there special and important reasons to review a Court of Appeals decision and order granting plaintiff a right to have its claims heard after the District Court had dismissed the case for lack of prosecution where

(1) there was no violation of the local rule of the District Court governing sua sponte dismissals for failure to prosecute;

(2) the District Court did not set the case down for a pretrial conference nor set the case for trial;

(3) defendants (here petitioners) never requested a pretrial conference or filed a motion for trial; and

(4) plaintiff, prior to the District Court's dismissal of the claim with prejudice, in an affidavit requested firm pretrial and trial dates.

STATUTES AND RULES INVOLVED.

Civil Rule 3 of the United States District Court for the District of Delaware reads as follows:

"Rule 3. *Calls of Calendar.*

There shall be a calendar call at the beginning of each term. The calendar shall consist of all cases pending 120 or more days prior to the time fixed for the call of the calendar. The call of the calendar shall be solely for the purpose of determining whether there has been any undue delay in connection with pending matters. Attorneys fully informed and with authority to speak will be expected to be present and explain the status of each case and any apparent unusual delay and, if called upon do so, agree upon expediting action which will be taken. The Court will then take such action, including the dismissal of cases, after notice, as is deemed to be

in the best interest of the proper administration of justice."

Civil Rule 11 of the United States District Court for the District of Delaware, in part, reads as follows:

"Rule 11. *Pretrial.*

A. . . . .

B. Unless otherwise ordered all civil cases shall be set for pretrial. Reasonable notice of the time and place of such pretrial shall be given by the Clerk by mail to counsel of record. Unless otherwise ordered counsel who will conduct the trial are required to appear before the Court for the pretrial conference. Should an attorney for a party fail to appear at a pretrial conference or to participate therein or to prepare therefor or to cooperate in the preparation of the pretrial order specified in Paragraph D hereafter, the Court, in its discretion, may hold a pretrial hearing, ex parte or otherwise, and after notice, enter an appropriate judgment or order.

C. . . . .

D. . . . .

E. . . . ."

Civil Rule 13 of the United States District Court for the District of Delaware, in part, reads as follows:

"Rule 13. *Assignment of Cases; Trials and Arguments.*

A. . . . .

B. Upon motion, cases will be set for trial by the judge to whom the case has been assigned. Jury trials, unless otherwise ordered, will take place in November,

February and May. Any party otherwise entitled to a jury trial who desires to have a trial date fixed shall move therefor at least 30 days before the first day of November, February or May, as the case may be. The motion shall contain a statement of the approximate time required for trial. Unless a written opposition stating the grounds thereof is served and filed within 5 days after the filing of a motion, the case may be fixed for trial in accordance with the motion. Any written opposition which is filed shall be disposed of promptly. C. . . . ."

STATEMENT OF THE CASE.

The petitioners omitted the following relevant facts from their discussion of the case:

1. The answer of Sunray DX Oil Company to the amended complaint, filed on January 18, 1965, admitted then owing plaintiff the sum of $3,624.45 arising out of an overriding royalty interest reserved to the plaintiff. (Appellant's Appendix in the United States Court of Appeals for the Third Circuit, p. 67a.)

2. On September 21, 1965 the District Court had its annual calendar call and this case was on the calendar. The "call of the calendar (is) solely for the purpose of determining whether there has been any undue delay in connection with pending matters." (See Civil Rule 3 of the United States District Court for the District of Delaware quoted *infra* at p. 3.) At the conclusion of the discussion of this case between counsel for all parties and the Court, the Court said nothing about delay but rather passed on to the next case on the list thanking counsel for the plaintiff for his report. See Docket Entry No. 61 in the United States District Court for the District of Delaware.

3. By letter dated April 18, 1966 the District Court (law clerk of the Judge to whom the case had been assigned) wrote to all counsel asking "when this case can be scheduled for trial". (See Appellees' Appendix in the United States Court of Appeals for the Third Circuit, p. 12b.) Counsel for plaintiff replied to this inquiry advising the Court, in part, as follows:

> "I have your law clerk's letter dated April 18, 1966, concerning the disposition of the above captioned action which has been pending for over 11 years. As your Honor may recall, our associate who

is in charge of this action practices in Chicago, Illinois.

I communicated with him in September of 1965. At that time, he advised me that with an exchange of information via interrogatories and several depositions, the case could be ready for trial during the Fall of 1966. I have again written to him since receiving your law clerk's letter. Shortly, I shall be in a position to better inform the Court of his intentions with regard to the disposition of this case." (*Id.*, p. 18b)

4. The next action taken in this case was the District Court's issuance of the rule, pursuant to Rule 12 of the Court, to show cause why the case should not be dismissed for lack of prosecution.

5. At the hearing on the return of this rule to show cause (see Appellees' Appendix in the United States Court of Appeals for the Third Circuit, pp. 25b-48b) plaintiff's local counsel asked the District Court to set "a firm trial date now (then) with pretrial conference". Counsel also agreed that a violation of the Court's order establishing pretrial and trial dates "would cause the case to be dismissed". (*Id.*, p. 27b). At this time local counsel for plaintiff filed an affidavit explaining the situation and again requesting that the Court set pretrial and trial dates. (See Appendix attached hereto at B-1-4; see also Appellant's Appendix in the United States Court of Appeals for the Third Circuit, p. 97a and 99a.)

REASONS FOR DENYING THE WRIT.

1. The Decision Below Is Not in Conflict With Any Other Decision.

Petitioners argue that the United States Court of Appeals for the Third Circuit did not find that the District Court abused its discretion in dismissing the claims without a trial and after plaintiff requested a trial. This argument is semantic only. To be sure the Court below did not use the words "abuse of discretion" in its Order but the Court's holding is the equivalent of finding an abuse of discretion. Petitioners cannot argue that the Court was unmindful of the applicable standard as their brief called it to the Court's attention on frequent occasions. (See Appellees' Brief (not on reargument) in the United States Court of Appeals for the Third Circuit, pp. 1, 12, 13, 18, 20, 23 and 26.) Moreover, the Opinion itself states that, "Plaintiff says that the dismissal was an abuse of judicial discretion." (Petitioners' Appendix, p. A-2). Petitioners' argument that the Court of Appeals thereafter did not consider whether there was an abuse of judicial discretion when it held for the plaintiff is specious and unworthy of further consideration here or by the Court.

There are decisions from the Third Circuit and other circuits affirming a dismissal of a claim for lack of prosecution. However, none of the cases cited by petitioners are contrary to the opinion sought to be reviewed here. In not one of the cases did plaintiff's counsel request a pretrial hearing, a firm trial date and not violate an order of the Court prior to the dismissal of the case. The Opinion below sets forth this vital distinction for all to see. "Upon return of a subsequent order to show cause, issued on June 3, 1966, plaintiff's counsel assured the Court that the mat-

ter would be moved for trial." (Petitioners' Appendix, p. A-2). Moreover, in most of the cases cited by petitioners either a rule or an order had been violated. This is not the case here.

Civil Rule 12 of the United States District Court for the District of Delaware states that when "no action has been taken for a period of one year, the Court may . . . enter an order dismissing such cause. . . . After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

In this case plaintiff requested a trial prior to the dismissal. While a request for a continuance and a proceeding under the discovery rules will not operate to toll the rule, a request for a pretrial and trial will and should. A motion for trial is not a request for a continuance and it is not discovery. The Rule specifically states what will not toll the application of the Rule. Other "action" taken will toll the operation of the Rule. A written request for a pretrial hearing and a firm trial date was "action" taken within the period of one year prior to order of dismissal. Indeed, it is difficult to think of more significant actions. Thus, there was no violation of the Local Rule 12 and the District Court abused its discretion as the Court of Appeals for the Third Circuit held.

Petitioners complain that the Opinion below does not set forth meaningful standards for other courts to follow. There is only one standard in this case to be followed and the Opinion sets it forth—Do not dismiss, sua sponte, for lack of prosecution a claim when the plaintiff requests a pretrial hearing and a firm trial date prior to dismissal and the defendant has never moved for trial or dismissal pursuant to F. R. C. P. 41(b). (Petitioners' Appendix, p. A-1, 2.)

2. The Decision Below Has a Salutory Effect On Judicial Administration.

The District Court's Order dismissed plaintiff's claims with prejudice after plaintiff had asked for pretrial and trial dates. While orders of this kind would clear clogged Court dockets, justice would be denied. Our judicial system was established to operate to dispose of claims on their merits and not on any other basis.

Chief Justice Warren's comments as quoted by Petitioners are apt and not disputed. However, Petitioners' parade of horribles is nothing more than advocacy for their clients.

The lesson of the Opinion below is both easily found and applied. Courts should not tolerate unnecessary and unreasonable delay. If and when a case reaches this stage, a Court should order a pretrial hearing. If there is unreasonable delay then or non-compliance with the Court's order concerning the pretrial hearing, the Court may dismiss. *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962). Secondly, the Court has the inherent power or the power by rule to thereafter set a case for trial. If there is delay at trial or the violation of the Court's order concerning trial, the case may be dismissed. See *Torino v. Texaco, Inc.*, 378 F. 2d 268 (C. A. 3, 1967).

Conveniently, Petitioners forget that the defendant before a Court also has substantial control over delay. Federal Rule of Civil Procidure 41(b) gives the defendant the right to move for dismissal if the plaintiff has failed to prosecute his case or failed to comply with the rules or any order of the Court. The defendants (Petitioners) never moved to dismiss this case for lack of prosecution or for an alleged violation of a rule or order. Their complaints of delay are shallow and without substance.

CONCLUSION.

The Petitioners fail to analyze the cases they claim to be in conflict wtih the decision of the Court of Appeals for the Third Circuit. No case can be found where a claim was dismissed for lack of prosecution and plaintiff had requested a pretrial hearing and the setting of a trial date prior to dismissal. Perhaps Petitioners' lack of factual analysis is explainable when it is noted that they failed to inform the Court that plaintiff had moved for trial. Petitioners did not note plaintiff's counsel's request for trial made at the hearing and by affidavit filed prior to dismissal.

Docket delay is a serious problem in the administration of justice. Assuming an adequate number of judges and courtrooms, the problem is solved by trying cases—not dismissing them without a trial.

Therefore, it is respectfully submitted that Petitioners' request for the issuance of a Writ of Certiorari to review a decision of the Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

WILLIAM T. LYNAM, III,
WILLIAM D. BAILEY, JR.,
BAYARD, BRILL & HANDELMAN,
500 Continental American Building,
Wilmington, Delaware,
Attorneys for Glo Co., Respondent.

APPENDIX D.

Affidavit of William T. Lynam, III to Show Good Reason for the Inaction in This Action.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

C. A. No. 1659.

GLO CO., AN ILLINOIS CORPORATION,

Plaintiff,

v.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, BARNSDALL OIL COMPANY, A DELAWARE CORPORATION, AND SUNRAY OIL CORPORATION, A DELAWARE CORPORATION,

Defendants.

William T. Lynam, III, being first duly sworn did depose as follows:

1. He is presently local counsel for plaintiff in the above action.

2. Primary counsel for plaintiff is Thomas Hart Fisher of Chicago, Illinois. Mr. Fisher represented plaintiff in a similar action in Texas. See Glo Co. v. Murchison, et al., 208 F. 2d 714 (5th Cir. 1954), reh. den., 210 F. 2d 372, cert. den., 348 U. S. 817 (1954).

3. Mr. Fisher is now at his law office at Caf Saint-Pierre Departement duVar, Paris, France. Mr. Fisher has been in Europe since some time in late May 1966 and must remain in Europe until the last half of August because of firm business commitments.

4. Mr. Fisher wrote to me by letter dated June 15, 1966, and informed me that plaintiff is "ready, able and willing to go to trial". He suggests that he could and would try this case at almost any date after September 1, 1966. A trial date and a pre-trial conference date may now be set by the Court.

5. This is a case which needs relatively little discovery prior to trial. Plaintiff needs now to know the quantity and value of all minerals produced by defendants, or on their behalf, or by others claiming under them, from the lands described in Exhibit 1 attached to the Amended Complaint.

6. It should be noted that Sunray admits owing plaintiff $3,624.45 as of January 18, 1965. See paragraph 8 of its Answer.

7. The basic reason for inaction on plaintiff's part is a lack of communication. Mr. Fisher has been under the firm belief that this Court would set the case for trial. He believes that plaintiff has no "affirmative duty" to schedule the case for trial.

8. Plaintiff's local counsel interpreted the Court's letter to all counsel dated April 18, 1966, as a request for counsel to agree on a trial date. Plaintiff's local counsel responded that with some discovery the case "could be ready for trial during the Fall of 1966". The next communication plaintiff received from the Court was a copy of the Order now in issue.

9. Plaintiff's local counsel has spent about twelve to fourteen hours during the last ten days familiarizing himself with the facts of this case as well as the Texas law. It is now understood that he will take an active role in the prosecution of this claim.

10. Secondly, a partial reason for plaintiff's inaction is that plaintiff's local counsel told the Court at the last call of the calendar that this case would be tried either during the late Spring or early Fall of 1966. Neither the Court nor Defendants' counsel commented upon this case at that time. The events of the call of the calendar were related to Mr. Fisher and he responded that the case could be tried this year.

11. Defendants have not diligently pressed this claim toward trial nor have they pursued a course where the validity of their defenses might be determined before a trial.

12. Defendants have not suffered any prejudice as a result of plaintiff's delay in this case.

W. T. Lynam, III,
William T. Lynam, III,
Wilson and Lynam,
306 Delaware Trust Building,
Wilmington, Delaware,

Sworn to and subscribed before me this 27th day of June 1966.

.....

Notary Public.

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FILED
OCT 28 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 205.

MURCHISON AND COMPANY, a Delaware Corporation, and SUNRAY DX OIL COMPANY, a Delaware Corporation,
Petitioners,

v.

GLO CO., an Illinois Corporation.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 205.

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION,

Petitioners

v.

GLO CO., AN ILLINOIS CORPORATION.

REPLY BRIEF FOR PETITIONERS.

INTRODUCTION.

Respondent's brief (RB) in opposition to the Petition for a Writ of Certiorari (Pet.) requires a brief reply. Respondent attempts to justify the opinion of the Court of Appeals[1] and thus to argue its case on the merits. We

1. Since the filing of the Petition for a Writ of Certiorari in this case, both the opinion of the Court of Appeals dated December 20, 1967, reversing the dismissal by the District Court and the majority and dissenting opinions of the Court of Appeals on rehearing dated March 20, 1968, reversing the dismissal by the District Court, have been reported as *Glo Co. v. Murchison and Company, et al.*, 397 F. 2d 928 (3d Cir. 1968).

respectfully submit that certiorari should be granted because the opinion below is in serious conflict with controlling decisions and because it adversely affects the administration of justice.

Respondent's brief only emphasizes the need for review since its contentions highlight the unfortunate import of the precedent created by the opinion below.

REPLY ARGUMENT TO RESPONDENT'S BRIEF.

A. Precedent Established by the Court of Appeals.

The main point of respondent's brief is that the opinion of the Court of Appeals should stand since it holds that the District Courts lack the power to dismiss, *sua sponte*,[2] if a request for trial is made by plaintiff at a hearing on a rule to show cause regardless of the history of the case (RB p. 8).

We do not understand how respondent reads such a holding into the opinion which articulates no standard, but states only that it is "reluctantly" reversing "in view of the unusual nature of the circumstances" (Appendix B, p. A-5; 397 F. 2d at 929). The very fact that this opinion opens the door to such bizarre interpretations makes it a dangerous precedent throughout the federal system.

Judge Van Dusen's dissent in the Court of Appeals is a clear and concise statement of the history of this case which highlights the plaintiff's delay and the series of warnings by the District Court to the plaintiff. Only one fact is necessary to repeat here.

---

2. This Court has already foreclosed the argument of Respondent that suggests that defendant must make a motion to dismiss under Rule 41(b), F. R. C. P. *Link v. Wabash Railroad Co.*, 370 U. S. 626, 8 L. Ed. 734, 82 S. Ct. 1386 (1962).

On June 3, 1966, the District Court, *sua sponte*, issued the second rule to show cause why the case should not be dismissed (Pet., p. 4). Subsequently, at the June 27 hearing on the rule, respondent, with the prospect of dismissal imminent, asked for the first time that a trial date be set (RB p. 6). If such an offer of trial is sufficient to preclude dismissal as a matter of law, a party could always prevent the application of the rule and avoid a dismissal for failure to prosecute. Such a rule is contrary to the plain intent of Fed. R. Civ. P. 41(b) and the local court rules governing dismissal for failure to prosecute, all of which were specifically approved by this Court in *Link v. Wabash, supra.*

B. Misleading Factual Statement.

There is a misleading statement of fact in respondent's brief. Respondent points out that the answer of one petitioner, Sunray DX Oil Company (hereinafter "Sunray"), had admitted owing some amount to respondent (RB p. 5). Respondent makes this statement to this Court in the face of the undisputed fact that Sunray *paid* to respondent the small and isolated amount admitted to be owing and Sunray agreed to pay all similar amounts accruing in the future. The District Court Judge himself removed this as a valid issue; he did not permit the dismissal to become final until payment was made.[3]

---

3. This matter is fully documented in the record in the Court of Appeals. See *e.g.* Appellant's Appendix, pp. 98a-100a; Appellee's Appendix, 51b-54b; Appellee's Petition for Rehearing, pages 3-6.

CONCLUSION.

For the reasons stated above, as well as those stated in the Petition for Certiorari, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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